Supreme Court, U.S.
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No. 03-706

In The

Supreme Court of the United States

THE OSLER INSTITUTE, INC.,

Petitioner,

v.

LOIS FORDE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Should the Supreme Court consider whether Osler received adequate notice and opportunity to respond prior to a district court's entry of summary judgment *sua sponte*?

PARTIES TO THE PROCEEDING BELOW AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondent submits this Corporate Disclosure Statement:

The Respondent, Lois Forde, is an individual who resides in the State of Washington and was employed by the petitioner, The Osler Institute, Inc., an Indiana corporation.

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I. REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

A. The issue presented by Osler does not meet the standards of Rule 10, Rules of the Supreme Court of the United States.

The Respondent ("Forde") contends that the Seventh Circuit's decision turned on a fact-sensitive analysis of the proceedings in the district court and, as such, does not entail an issue for which there is conflict among the Circuit Courts, an important federal question, or represent a departure "from the accepted and usual course of judicial proceedings, or sanctioned such a departure by the lower court." As evident from Forde's position outlined in this brief, the decision turned on the interpretation of certain statements or actions by the parties and the district judge and whether such circumstances constituted adequate notice to the Petitioner ("Osler") that the district judge might consider granting summary judgment.

For this reason alone, the Petition for Writ of Certiorari should be denied.

B. The decision at the district court and affirmed by the Seventh U.S. Circuit Court of Appeals is consistent with the record in the case and applicable case law, and turns on fact-sensitive and appropriate considerations by the district judge.

Osler strains in its Petition to raise an issue worthy of this Court's consideration – a burden it cannot meet after even a cursory review of the record and the appellate court's thorough decision affirming the district court's entry of judgment. This case presents neither genuine

conflict in Circuit decisions nor an unjust application of law by a district judge with the consent of his appellate colleagues. Instead, this is a case in which a district judge repeatedly communicated his skepticism about the Osler's case, on both the law and the facts. The record discloses, and the Seventh Circuit amplified, that Osler had ample notice that its case was in trouble and that the court might not ever see a basis to conduct a trial.

The fact-sensitive nature of the decision should be evident in this truncated synopsis:

Shortly before trial was to proceed, U.S. District Judge Larry J. McKinney heard oral arguments on a series of pre-trial motions. The parties had filed contentions, pre-trial disclosure lists, and a 500-page joint stipulation of exhibits. The case had been fully briefed and was scheduled for a court trial.

In a final pre-trial conference, Judge McKinney emphasized his concerns about Osler's case and issues raised in Forde's brief he considered "troublesome," including some that "appear to be relatively dispositive on some issues that may or may not be presented at trial." Osler's counsel asked for more time to address the issues and, given that Forde's brief was long and only recently filed, the judge demurred by vacating the trial date and ordering the parties to return 16 days later for oral argument (this would be only two days after the original trial date and a time when, presumably, both parties were fully prepared to try the case on the merits). Judge McKinney ended the conference by advising the parties that following this oral argument on these issues he would "reset this case about 30 days later, **or not**, depending on what we decide." (emphasis added) Prior to the oral argument, both

parties filed supplemental briefs (Osler included an affidavit). Both sides were told to bring their clients to the oral argument. Following the conference, Judge McKinney issued an Order stating, "It is apparent that there are several issues that may be resolved before trial as a matter of law" and that, "It is clear that those issues must be resolved before the case is submitted to a jury."

The oral argument proceeded without protest by Osler. The court covered a number of issues raised in the trial brief. Osler's counsel never suggested that it intended to call particular witnesses to address those issues or informed the court that there was critical evidence as yet unpresented to the court. At the conclusion of this oral argument, Judge McKinney advised all counsel that, "I'll do my best to get back *to give you a ruling* on this without too much delay." [emphasis added]. Thirty days later, the court issued an entry that effectively disposed of all issues in the case favorably to Forde – in essence, the parties are agreed, a *sua sponte* summary judgment entry (although the district court did not characterize its ruling in that way).

Having consented to the series of events without protest, and participated fully in the on- and off-the-record discussions with the district judge about the case's status and readiness for trial, Osler now protests the entry of summary judgment without notice and urges this Court to devote resources to identifying a national standard of notice required prior to a district court's exercise of its otherwise legal discretion by entering summary judgment *sua sponte*.

That it has such power is beyond question. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Exercising that

power is, to borrow a phrase from Seventh Circuit jurisprudence, "hazardous," and is one that warrants "special caution." *Jones v. Union Pac.R.R. Co.*, 302 F.3d 735, 740 (7th Cir. 2002) (cites omitted). *Jones'* holding, following *Celotex,* was that the court may indeed enter such a summary judgment entry "as long as the losing party is given notice and an opportunity to come forward with its evidence." *Id.* This procedure does not require a motion from an adverse party nor is there any holding that requires the district court to issue an explicit statement that it is considering making such an entry. Osler is left to complain only that the judge's overt skepticism about the viability of its case followed by a series of submissions and hearings was not a clear enough signal that it needed to examine seriously the evidentiary support for its claims. In fact, the district judge said, and the Seventh Circuit opinion emphasized, that the judge had betrayed his intentions by suggesting that it might not even be necessary to re-schedule the case for trial after he issued a ruling.

Meanwhile, despite the district judge's clear signals, Osler made:

- No inquiry about the purpose of oral argument scheduled or sought to clarify what would be discussed and for what purpose
- No objection to the vacation of its trial date
- No attempt to gather other evidentiary materials or make additional submission, save for a single affidavit, prior to or subsequent to oral argument
- No objection to the oral argument itself in a supplemental brief filed prior to the district court's ruling despite the judge's explicit coda

> at the conclusion of the argument promising "my best to give you a ruling on this without too much delay."

The appellate court opined that this procedural background, the statements of the court, and the actions (or inactions) of the parties and their counsel formed a sufficient basis for the district judge to dispose of the case by *sua sponte* summary judgment entry. In fact, the appellate court's decision specifically identified Osler's concession that it understood the judge might resolve *some* of the legal issues (but not necessarily all). There was every reason for Osler to comprehend that all of the issues were in play and all were "potentially dispositive," as Judge Evans noted in the appellate court opinion.

Significantly, Osler cannot argue that it was unrepresented or that the district court reached its decision based on no evidence or basis whatever. In fact, the district court already had before it a sizeable record, stipulated by the parties, and had examined counsel on a number of key issues in the case. Osler urges now that this Court establish a national standard in what are evidently relatively rare instances in which a *sua sponte* judgment is entered and where, as here, the record reveals a series of statements, behaviors, and decisions *prior* to a summary judgment ruling that cannot be credibly argued to have caught Osler or its counsel unaware.

C. The appellate court's opinion is consistent with the fact-sensitive analysis evident in a number of cases decided in the Seventh Circuit adjudicating *sua sponte* summary judgments.

Forde contests the suggestion that the Seventh Circuit has acted inconsistently with its own precedents in affirming the district court. In fact, the appellate court has undertaken a careful analysis of the factual or procedural circumstances in each case, as it did in this one. Osler's appeal is soliciting a reconsideration of the facts, not the application of a new legal analysis.

There is no basis to conclude that the procedural history conflicts with the *Celotex* decision as applied by the Seventh Circuit in *Simpson v. Merchants Recovery Bureau, Inc.*, 171 F.3d 546 (7th Cir. 1999) and its progeny, most notably, *Jones v. Union Pacific, supra*). In *Simpson*, the Seventh Circuit recognized that, as a general rule, "a district court lacks the power to grant summary judgment *sua sponte* unless the party against whom summary judgment was entered had (1) proper notice that the district court was considering entering summary judgment and (2) a fair opportunity to present evidence in opposition to the court's entry of summary judgment." *Simpson*, 171 F.3d at 540, citing *Celotex*, 477 U.S. at 326.

As noted previously, the record at the district court as reviewed by the Seventh Circuit demonstrates both requirements were met, i.e., Osler was on reasonable notice (if not explicitly raised by a motion written by its adversary or the court) that the district court was considering a dispositive handling of the case and Osler had a full opportunity by brief, argument, and supplemental submission to present its opposition to the court. This

standard was applied where no formal motion was pending in *Jones, supra*: "[T]he court may enter summary judgment *sua sponte,* as long as the losing party is given notice and an opportunity to come forward with its evidence." *Jones*, 302 F.3d at 740.

Likewise, the court upheld a *sua sponte* summary judgment in *Hunger v. Leininger*, 15 F.3d 664, 669 (7th Cir. 1994):

> A district judge is authorized to grant summary judgment to a party that has not requested it (cite omitted). . . . he is not required to conduct a trial when there is no genuine issue of material fact, just because the parties lack the wit to notice the absence of any triable issues.

In *Goldstein v. Fidelity and Guaranty Insurance Underwriters, Inc.*, 86 F.3d 749, 751 (7th Cir. 1996), the Seventh Circuit again affirmed a district court's *sua sponte* summary judgment:

> We do not want to encourage district courts to consider summary judgment *sua sponte* because the procedure warrants 'special caution,' and it's often inappropriate. *See*, *Sawyer v. United States*, 831 F.2d 755 (7th Cir. 1987). It is also largely unnecessary, as the district court can always invite a nonmoving party to file a motion for summary judgment in its favor. But while we do not express resounding approval of *sua sponte* summary judgment, it is not always wrong for the district court to resolve certain cases in this fashion. It's just a bit risky. In this case, however, we conclude that Goldstein was afforded the necessary safeguards, and that the potential hazards of the procedure were avoided. No genuine issue of material fact existed, and disposition of

> the case hinged upon the Judge's interpretation of the insurance policy. We reject the claim that (the judge), in this case, was wrong to act *sua sponte*.

These cases are distinguishable from the facts in *Simpson*, *supra*, in which a party was not provided an opportunity to present evidence and the court relied on evidence filed contrary to the court's order. In *Simpson*, the district court's approach failed on both counts: the appellate court determined that the record did not support a view that the losing party could reasonably construe the proceedings to be one for a dispositive ruling and the district court had requested only limited input from the parties on certain legal actions. As such, the Seventh Circuit concluded the result was a "surprise" to the losing party. Moreover, the losing party's counsel objected at the hearing to the court's intention to grant summary judgment and requested specific opportunity to present additional evidence. The appellate court concluded this omission denied the losing party a meaningful opportunity to respond. Where there was no reasonable notice or opportunity to respond, the Seventh Circuit reversed the district court's decision.

As noted previously, Osler's counsel made no protest whatever during the relevant time period when it was clear the court was considering a dispositive handling of at least some, if not all, of issues outlined in the parties' trial briefs. Osler even submitted a supplemental brief *after* the July 24 hearing, leaving at least the inference that it had nothing more to present to the court with respect to those issues addressed in the trial briefs.

The Seventh Circuit also left undisturbed a district court's entry of summary judgment entered *sua sponte* and

without notice to the losing party in *Farries v. Stanadyne/Chicago Division*, 832 F.2d 374 (7th Cir. 1987), even though the trial judge failed to give notice of the trial judge's conversion of a Rule 12(b) motion into one for summary judgment. The court held:

> Our decision in *Milwaukee Typo* makes clear that a potentially disputed material issue of fact must exist to justify reversal of a trial court's decision to convert a motion to dismiss into a summary judgment where he fails to give the parties notice of his intention to convert the motion:
>
> > 'Where the record discloses the existence of unresolved material fact issues, or where the parties represent that they would have submitted specific controverted material factual issues to the trial court if they had been given the opportunity, we would have to find that summary judgment was inappropriate . . . *But where no potential disputed material issue of fact exists, a summary judgment will not be disturbed even though the district court disregarded the procedure which should have been followed.* . . . '.

832 F.2d at 377-78 (cites omitted).

By contrast, Osler cites *English v. Cowell*, 10 F.3d 434 (7th Cir. 1993) to support its view that the Seventh Circuit has been inconsistent in its consideration of such cases. Osler contends that the *English* proceedings afforded more notice than Osler received in this case. In *English*, however, the district court's decision was determined to be premature for the obvious reason that the judge's decision preceded the losing party's deadline to submit a brief. This offended the *Celotex* requirement that a losing party have

a reasonable opportunity to respond. Osler can make no such claim here.[1]

In *Aviles v. Cornell Forge Co.*, 183 F.3d 598 (7th Cir. 1999), the Court determined that raising an issue for the first time in a summary judgment reply brief denied a losing party a meaningful opportunity to respond. The losing party pursued one of its two available options by moving to strike that portion of the reply brief (the other choice was to petition for an opportunity to file a surreply brief). The court never ruled on the motion to strike and entered *sua sponte* summary judgment on the entire complaint anyway – a procedural history the Seventh Circuit concluded failed the "opportunity to respond" requirement of *Celotex*. It is important to emphasize, as Osler does not, that the losing party was resisting the entry of judgment, not acquiescing to the proceeding as did Osler in this case.

In all of these cases, the Seventh Circuit was engaged in scrutiny of the record to determine whether both *Celotex* strands had been satisfied: notice and opportunity to respond. As the parties here acknowledge, there is no

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[1] The Seventh Circuit opinion goes on to note that "remand is warranted because the harmless error doctrine does not save premature rulings when the loser did have something substantial to say in opposition." *English*, 10 F.3d at 438. Although Osler had opportunities to present arguments in the appellate proceedings that would support a view that the judge's decision would have been impacted by some evidentiary submission or legal argument it was denied the opportunity to present at the district court, it has cited none. This suggests that the losing party here had nothing more to say beyond its joint stipulation of exhibits and arguments advanced in the trial brief, oral argument, and supplemental brief.

specific guidance as to how or what such a notice should contain nor is there a specific outline of how the opportunity to respond may be exercised. What is clear, however, is that the Seventh Circuit has consistently applied the appropriate legal guidelines. Whether a particular set of facts or a district court record fits within those guidelines is a matter for the sound discretion of the appellate court. The issues of "unfair," "surprise," "reasonable opportunity to respond" that naturally are raised when a *sua sponte* summary judgment is challenged may be applied with consistency and yet result in different outcomes based on the underlying facts. Forde contends that Osler is dissatisfied with that application in the courts below here and has no basis for getting yet another review of this record by contending the Seventh Circuit has been inconsistent or that injustice meriting review under Rule 10 is evident. In fact, the record here supports the contrary conclusion.

II. CONCLUSION

If Osler was "unfairly surprised" by the district judge's decision, it had only itself to blame. Every indication short of a billboard notice or a mallet over the head had signaled the judge's skepticism and highlighted the weaknesses of Osler's case. Vacation of a trial date alone in such circumstances should sound alarms. The tenor of the argument that ensued and the submission of additional material certainly had all of the earmarks of a case that *might* never reach trial. In such circumstances, Osler is not entitled to plod along with the procedural steps in the confidence that, absent some "between the eyes" notice from the judge's pen, it could survive scrutiny of its trial brief and proceed with a trial.

Moreover, Osler was a full participant in the process of which it complains. It filed its briefs and supplemented them. It appeared at a hearing and made its arguments through counsel. It resisted Forde's explicit positions on fact and law in multiple ways. It consented to the submission of an evidentiary record. On this record, Osler clearly had an opportunity to respond.

Even if and when abuse occurs in that process, the Courts of Appeals are appropriate reviewers and arbiters of the processes in the courts below. It is a matter, like many, routinely conferred to the lower courts to uncover injustice and correct error – and in a highly fact-sensitive scenario such as this one and those like it, there hardly needs to be a standard enunciated by the Supreme Court of the United States greater than its guidance in *Celotex*.

For these reasons, the respondent, Lois Forde, respectfully requests the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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